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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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MIDLANTIC NATIONAL BANK,

*Petitioner,*

*vs.*

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

*Respondent.*

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## PETITION OF MIDLANTIC NATIONAL BANK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## Questions Presented for Review

1. Whether the Third Circuit Court of Appeals erred in holding that a bankruptcy trustee's ability to abandon burdensome and valueless property under 11 U.S.C. §554 (1982) is conditioned upon compliance with state police power regulations?

2. Whether the Third Circuit Court of Appeals erred in interpreting 11 U.S.C. §554 (1982) and 28 U.S.C. §959 (b) (1982) so as to raise a substantial question as to the taking of property without just compensation in sharp conflict with the decision of this Court in *United States* v. *Security Industrial Bank,* 459 U.S. 70, 103 S. Ct. 407, 74 L. Ed. 2d 235 (1982)?

## Parties

The parties who appeared before the Third Circuit Court of Appeals in this proceeding are listed below.

The New Jersey Department of Environmental Protection, Appellant.

Thomas J. O'Neill, Trustee for Quanta Resources Corporation, Appellee.

Midlantic National Bank, Appellee.

James V. Frola and Albert Von Dohlin, Appellees.

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### Opinions Below

The opinion of the Third Circuit Court of Appeals is reported at 739 F. 2d 927 and is set forth at pages 35a to 40a of the appendix to the separate petition of the Quanta Resources trustee, Thomas J. O'Neill ("the Trustee"). The amended judgment of the Court of Appeals is set forth at pages 47a to 48a of the appendix filed by the Trustee. The order denying the petition for rehearing by the Circuit Court of Appeals is set forth at pages 49a to 51a of the appendix filed by the Trustee.

The opinion of the Third Circuit Court of Appeals in the companion case of *City of New York* v. *Quanta Resources Corp. (In the Matter of Quanta Resources Corporation, Debtor)*, is reported at 739 F. 2d 912. This opinion is also set forth at pages 1a to 43a of the appendix filed by the Trustee. The opinion of the United States District Court for the District of New Jersey in the companion case is not reported but is set forth at pages 52a to 60a of the appendix filed by the Trustee. The opinion of the United States Bankruptcy Court for the District of New Jersey in the companion case is not reported but is set forth at pages 69a to 75a of the appendix filed by the Trustee.

## Jurisdiction

Midlantic National Bank seeks to invoke jurisdiction of this Court pursuant to 28 U.S.C. §1254 (1) (1982). The amended judgment from which review is sought was entered on July 25, 1984. The order denying the petition for rehearing by the Circuit Court of Appeals was entered on August 16, 1984.

## Statutes

There are two federal statutes which are central to this petition, 11 U.S.C. §554 (a) (1982) and 28 U.S.C. §959 (b) (1982).

11 U.S.C. §554 (a):

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

28 U.S.C. §959 (b):

> Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

## Statement of the Case

Quanta Resources Corporation ("Quanta") formerly conducted a waste oil recovery business in Edgewater, New Jersey. It began its New Jersey operation in July, 1980 when Quanta purchased the assets of Edgewater Terminals, Inc. Through that transaction, Quanta took an assignment of the lease for the Edgewater property and an assignment of the New Jersey Department of Environmental Protection ("NJDEP") Temporary Operating Authorization for the facility. On June 3, 1981, Quanta obtained a loan of $600,000.00 from Midlantic National Bank ("Midlantic") for working capital. Midlantic obtained a security interest in Quanta's inventory, accounts receivable and certain equipment that was duly perfected pursuant to New Jersey law.[1]

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[1] By order dated April 5, 1982, the United States Bankruptcy Court for the District of New Jersey determined that Midlantic holds a "first priority security interest" in various Edgewater property including the waste oil inventory relevant to this application. Midlantic's security interest does not extend to a separate Quanta waste oil operation in Long Island City, New York.

Then, later in June, 1981, NJDEP sampled waste oil stored by Quanta at the Edgewater site and discovered unlawful concentrations of polyclorinated biphenyls ("PCBs"). Under the terms of the NJDEP Temporary Operating Authorization, PCBs could not be stored at the facility. As a result, on July 21, 1981, Quanta complied with a NJDEP request and cease all operations at the Edgewater site. On October 6, 1981, Quanta filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. The Chapter 11 petition was converted to a Chapter 7 liquidation proceeding on November 18, 1981 and on that same day, Thomas J. O'Neill ("the Trustee") was designated as the Quanta trustee.

The Trustee proceeded to sell a portion of the Edgewater waste oil inventory that was not contaminated with PCBs.[2] In addition, through notices issued on October 8, 1982, October 18, 1982 and April 22, 1983, the Trustee announced his intention to abandon the PCB laden waste oil inventory in Edgewater. Over NJDEP objections of October 14, 1982 and April 27, 1983, the Bankruptcy Court authorized abandonment of the Edgewater site by order of May

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[2] On July 7, 1982, the owners of the Edgewater property, Frohla and Von Dohlin, started an action in the Bankruptcy Court seeking, *inter alia,* an order directing the Truestee to turn over the proceeds of the sale of this oil to the landowners. *Frohla* v. *O'Neill* (*In re Quanta Resources Corporation*), Case No. 81-05967, Adversary No. 82-0753 (Bkrtcy. D.N.J.). By order of April 27, 1983, the Bankruptcy Court dismissed the claim of the landowners and NJ DEP and deferred resolution on the Midlantic claims as being premature. The NJDEP appeal to the District Court from this order is now pending although on "administrative hold" until the abandonment issue is resolved. *Frohla* v. *O'Neill* (*In re Quanta Resources Corporation*), Civil Action No. 83-4358 (D.N.J.). Pursuant to a consent order, the Trustee has distributed the proceeds to various parties subject to further adjudication of NJDEP's rights.

20, 1983.[3] Over the dissent of Circuit Judge Gibbons, the Third Circuit Court of Appeals reversed holding that the Trustee would violate state environmental legislation if he were to abandon the contaminated oil and that the Trustee must somehow bring the Edgewater site into compliance with local environmental laws.

## *ARGUMENT*

## POINT I

**The interpretation given to 11 U.S.C. §554(a) by the Court of Appeals conflicts with the rule of statutory construction confirmed in *United States* v. *Security Industrial Bank*, 459 U.S. 70, 103 S. Ct. 407, 74 L.Ed. 2d 235 (1982).**

As a creditor with a perfected security interest in the fund created from the sale of a portion of Quanta's inventory, Midlantic must raise its voice and cry out on behalf of all creditors against the far reaching interpretation of 11 U.S.C §554(a) by the Court of Appeals. Under the decision below, who must bear the huge cost of disposing of the PCB contaminated waste oil? NJDEP is not pursuing the debtor so as to bring this case within the scope of *Ohio* v. *Kovacs*, No. 83-1020 (Sup. Ct., *argued* Oct. 10, 1984). NJDEP has not spent state monies to clean up the site so as to trigger applicability of the

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[3] The United States Bankruptcy Court for the District of New Jersey had jurisdiction over the abandonment application under §405 of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, Title IV, 92 Stat. 2686 (1978), *reprinted in note preceding*, 28 U.S.C.A. §1471 (West Supp. 1983) and Local Rule 47 of the United States District Court for the District of New Jersey that was issued on October 1, 1982.

"first priority lien" provision of the New Jersey Spill Compensation and Control Act.[4] Instead, the Court of Appeals has directed the Trustee, who stands without sufficient resources to finance the clean up project, not to abandon the site while it remains in a contaminated condition. In fact, the Court of Appeals has shifted the burden of environmental compliance from the debtor to the Trustee to the creditors, including secured creditors such as Midlantic.

The Court of Appeals saw no constitutional "taking question arising under the Fifth Amendment in destroying Midlantic's rights as a secured creditor in favor of the public welfare. Indeed, the Court of Appeals dismissed Midlantic's constitutional argument in a footnote.[5] Through this casual dismissal of the taking issue, the Court of Appeals completely disregarded the rationale of this Court in *United States* v. *Security Industrial Bank,* 459 U.S 70, 103 S. Ct. 407, 74 L.Ed. 2d 235 (1982). As a result, Midlantic's petition for certiorari should be granted so as to remedy the present conflict between the decisions of the Third Circuit Court of Appeals and this Court.

It is difficult for Midlantic to improve on the pointed critique of the majority's taking analysis that is found

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[4] N.J.S.A. 58:10-23.11f(f) (West Supp. 1984). Midlantic believes that there are grave constitutional issues as to the application of this environmental priority statute to destroy a preexising lien. However, Midlantic does not understand why NJDEP has refused to protect the public from the environmental hazards of the Edgewater site by spending Spill Fund monies.

[5] Footnote 11 to the opinion of the Court of Appeals in the companion case of *City of New York* v. *Quanta Resources Corp.* (*In re Quanta Resources Corp.*), 739 F.2d at 922.

within the dissenting opinion of Circuit Judge Gibbons.[6] Instead, Midlantic will only briefly summarize the major arguments set forth in that dissent.

First, under the *Regional Reorganization Act Cases,* 419 U.S. 102, 95 S. Ct. 335, 42 L.Ed 2d 320 (1974), destruction of Midlantic's security interest by operation of 11 U.S.C. §554(a) raises a substantial taking question. In that decision, however, the taking question was mooted because the claimants against the bankrupt railroad estates had an available alternative remedy under the Tucker Act.[7] *Id.,* 419 U.S. at 136. Here, Midlantic and the other Quanta creditors have no such remedy. The entire Midlantic lien would be destroyed by the order of a federal court under 11 U.S.C. §554(a). Such a complete taking of a secured creditor's property interest is invalid under *Louisville Joint Stock Land Bank* v. *Radford,* 295 U.S. 555, 55 S. Ct. 854, 79 L.Ed. 1593 (1935) and *Armstrong* v. *United States,* 364 U.S. 40, 80 S. Ct. 1563, 4 L.Ed. 2d 1554 (1961). As noted by Justice Brandeis in the *Radford* opinion,

> [T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgages in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

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[6] 739 F.2d 923-927.

[7] 28 U.S.C. §1491.

*Radford,* 295 U.S. at 602. Surely, it is similarly unfair to expect Quanta's creditors to bear the clean up burden which should be more appropriately borne by the public at large.

Second, the majority's string citation of Supreme Court cases upholding limited regulatory actions under a state's police power stands completely off the mark. It is without question that the decision of the Court of Appeals will lead to the total destruction of Midlantic's lien. It is also certain that the Trustee will never have enough funds to effectuate the remedial plan envisioned by NJ DEP. The result is not regulation but destruction. Moreover, the effect falls upon an innocent third party and not a primary actor somehow responsible for the necessity of the regulatory action. Under these facts, the Court of Appeals erred in finding that its construction of 11 U.S.C. §554(a) did not raise a substantial question under the taking clause of the Fifth Amendment.

Once such a question was raised, the holding of this Court in *United States* v. *Security Industrial Bank,* 479 U.S. 70, 103 S.Ct. 407, 74 L.Ed. 2d (1982), required that the court below ascertain whether another construction of 11 U.S.C. §554(a) would avoid the constitutional question. Id., at 103 S.Ct. at 412; *see also, Lorillard* v. *Pons,* 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed. 2d 40 (1978). A construction that would not condition environmental compliance with abandonment would certainly avoid this constitutional taking issue.

## POINT II

**This Court should accept jurisdiction of this matter to settle an important question of federal law—whether abondonment of burdensome and worthless property under 11 U.S.C. §554(a) is subject to local police power restrictions?**

After reviewing the opinion of the Court of Appeals in this matter, at the minimum, one must conclude that the decision reached therein was not an easy one. Many factors argued for the result sought by both the Trustee and Midlantic. First, the plain language of 11 U.S.C. §554 (a) did not refer to the limitation sought by NJDEP. Second, the Court of Appeals could find no legislative history in support of the NJDEP position. Third, a separate provision of the Bankruptcy Code, 11 U.S.C. §704, indicated that the Trustee was fulfilling his *principal* duty by closing the estate in an expeditious manner. Fourth, the question put to the Court of Appeals by NJDEP was one of first impression.[8] Fifth, the construction given to another relevant statute, 28 U.S.C. §959(b), by both Profesesor Moore[9] and the Eighth Circuit Court of Appeals[10]

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[8] Several cases decided prior to the enactment of the statutory abandonment provision did condition a trustee's abandonment power. *Ottenheimer* v. *Whitaker*, 198 F.2d 289 (4th Cir. 1952); *In re Lewis Jones, Inc.*, 1 Bkr. Ct. Dec. 277 (Bkrtcy. E.D. Pa. 1974). In both cases, the absence of a statutory abandonment provision weighed heavily in reaching the decision to condition the abandonment power.

[9] 7-Pt. 2 Moore's Federal Practice, ¶66.04(4) (1980).

[10] *State of Mo.* v. *U.S. Bkrtcy Court, Etc.*, 647 F.2d 768, 778 (8th Cir. 1981), *cert. den.*, 454 U.S. 1162, 102 S. Ct. 1035, 71 L.Ed.2d 318 (1982).

remarkably contrasted with the construction urged by NJDEP. Sixth, 11 U.S.C. §362(b)(5) contains a specific provision which excepts police power injunctive actions from the automatic stay imposed by the bankruptcy filing. Since 11 U.S.C. §554(a) does not contain a similar provision, the NJDEP argument lacked even further merit.

Yet, the Court of Appeals resolved the appeal in favor of NJDEP. Midlantic respectfully asserts that this determination was in error. Moreover, Midlantic would draw the attention of this Court to the dramatic impact of the decision below. With environmental sensitivity at a peak, the nation is committed to resource recovery and recycling of waste. Financing is needed for environmental business that will substitute technology for the callous waste disposal practices of the past. However, the risk associated with the Third Circuit's interpretation of 11 U.S.C. §554 (a) will discourage such lending.

The important question as to police power limitation of 11 U.S.C. §554(a) needs to be resolved by this Court so that commercial lending institutions will know what to expect in future transactions. The question has great national significance and should not be resolved in a piecemeal fashion by the remaining Circuit Courts of Appeals.

## CONCLUSION

Midlantic National Bank has demonstrated in the body of this petition that the Third Circuit Court of Appeals decision below conflicts with the rule of statutory construction outlined in *United States* v. *Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed 2d 235 (1982). Moreover, Midlantic has shown that the issues presented by this petition are of great national importance and require immediate resolution. It must be remembered that while the decision of the Court of Appeals facially fosters environmental concerns, the decision will also serve to harm the environment by discouraging lending to responsible businesses involved in waste disposal, recovery and recycling. Therefore, Midlantic National Bank, respectfully requests that its petition for a writ of certiorari to the Third Circuit Court of Appeals be granted.

Respectfully submitted,

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